LIBRARY
COURT, U. S.

No. 73-292

FILED
NOV 16 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

FINLEY DURHAM HENDRICKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-292

FINLEY DURHAM HENDRICKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 922(h)(1), which prohibits, *inter alia,* any person who is under indictment for a crime punishable for a term exceeding one year from receiving any firearm which has been transported in interstate commerce, violates the due process clause of the Fifth Amendment in that it arbitrarily classifies persons under indictment with persons convicted and destroys the presumption of innocence.

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of making false statements to obtain a firearm and of illegal receipt of a firearm, in violation of 18 U.S.C. 922(a)(6) and (h)(1), respectively. Petitioner was sentenced to two years imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. 9).

The facts are not in dispute. While petitioner was under indictment in a Kentucky court for the crime of wilful murder, which is punishable by imprisonment for a term exceeding one year, he purchased a Winchester rifle from McCarty's Feed Store in Pineville, Kentucky. In purchasing the rifle, petitioner filled out a United States Treasury Department form upon which he indicated that he was not under indictment for a crime punishable for more than one year, thereby violating Section 922(a)(6). Petitioner then received the rifle, thereby violating Section 922(h)(1).

Petitioner does not challenge the right of the Treasury Department to require a prospective purchaser to indicate on a form whether he is under indictment for a crime punishable by imprisonment for more than one year. Nor does he challenge the constitutionality of Section 922(a)(6), making it illegal to make a false written statement. Since petitioner was given concurrent terms on each conviction and does not contest the conviction under Section 922(a)(6), there is no need for the Court to review the conviction for violation of Section 922(h)(1). See *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16.

In any event, the constitutionality of 18 U.S.C. 922(h)(1) has been upheld by the Court of Appeals for the Sixth Circuit in *United States* v. *Craven,* 478 F. 2d 1329 (Pet. App. 11), certiorari denied, No. 72-1638, October 9,

1973,[1] cited by the court of appeals in the instant case (Pet. App. 9). We rely on *Craven* in urging that the petition for certiorari be denied.[2]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

---

[1] We are providing petitioner with a copy of our memorandum opposing certiorari in *Craven.*

[2] Although petitioner does not raise the issue, dictum in *United States* v. *Bass,* 404 U.S. 336, 342-343, suggests that 18 U.S.C. 922(h) may not reach intrastate transactions, even where there is an interstate commerce nexus. Since it appears that petitioner, a Kentucky resident, purchased the firearm in Kentucky, a question arises as to the applicability of 18 U.S.C. 922(h). However, in light of the concurrent sentence under a count not challenged and petitioner's failure to raise this issue at any stage of this proceeding, this Court need not consider the 18 U.S.C. 922(h) conviction.